IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL MISC.NO.63512 M OF 2005

DATE OF DECISION: JANUARY ,2007

Dr.Neera Garg

.....Petitioner

VERSUS

State of Haryana and another

....Respondents

CRIMINAL MISC.NO.9567 M OF 2006

Dr.Sudershan

.....Petitioner

VERSUS

State of Haryana and another

....Respondents

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. R.S.Cheema, Sr.Advocate with
Mr. J.S.Mehndiratta, Advocate,
for the petitioner.

Mr. Vikas Chaudhary, AAG, Haryana.

Mr. V. K. Jindal, Advocate.

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RANJIT SINGH, J.

What is the extent of negligence, which would lead to a change of criminal mis-conduct against a doctor to make him answerable for a criminal

offence under Section 304-A IPC is the question which arise for determination in these two petitions?

The above noted question has been raised in these two petitions through which the petitioners seek quashing of complaint dated 6.2.2002 made by Sudhakar Mittal, complainant (respondent No.2) on the basis of which, the petitioners, who are doctors, were summoned vide impugned order dated 18.7.2005.

The issue has elaborately been considered and adjudicated by the Hon'ble Supreme court in *Jacob Mathew Vs. State of Punjab and another*, (2005) 6 SCC 1 and as such, would not require any detailed analysis of law. It is to be seen if the law, as settled by the Supreme Court, would rescue the present petitioners, the doctors, from criminal liability, for which they have been summoned to face trial. The petitioners, while relying upon the law laid down in Jacob Mathew's case (supra) have prayed for quashing of the complaint and the summoning order on the ground that the allegation of negligence or mis-conduct revealing criminal offence against the petitioners would not be made out as per the law settled in the case of Jacob Mathew.

A few facts may be noticed, which lead to filing of the complaint and the summoning of the petitioners.

The complainant, Sudhakar Mittal, is a practicing Advocate at Karnal. He filed a complaint on 6.2.2002 under Section 156 (3) Cr.P.C. for registration and investigation of a case under Sections 315, 304, 336, 34 IPC against the petitioners. The wife of the complainant, who was pregnant, was admitted to Neera Nursing and Maternity Home, Karnal on 14.1.2002 for delivery. It is alleged

that at about 7.00 P.M., the doctor suddenly declared the requirement of conducting a caesarian operation as water (excreta) had entered into the lungs of the baby. After caesarian operation, the lady gave birth to a female child. The baby was born at 7.20 P.M. and is stated to have suffered the breathing problem, about which Dr.Neera Garg was immediately informed. It is alleged that the accused-doctor did not attend the baby personally and left it to the staff nurse to check, saying that such problems were usual. Allegations further are that the child was not attended throughout the night by Dr.Neera Garg. When the complainant found the baby crumbling and his request for putting the baby on oxygen was not heard, he shifted the child to Mahabir Dal Hospital, Karnal around 8.00 A.M. From there, the child was shifted to Uttam Nursing Home as there was no provision for ventilator in Mahabir Dal Hospital. Referring to opinion of one Dr.Sarita Chatley of Uttam Nursing Home, the complainant asserts that the child should have been immediately put on ventilator when she suffered from such a great respiratory problem. The child ultimately breathed her last at 6.00 P.M. As per the complainant, the baby could not be saved as she remained unattended for about 15 hours and was not given the required medical treatment immediately after birth, which could have saved the child. It is maintained that the petitioners were bound to put the baby on ventilator and by not doing so have failed to perform their professional duties, revealing negligence in causing the death of newly born baby.

This complaint, which was filed on 6.2.2002, was adjourned for consideration to 21.2.2002 and again ton 1.3.2002. On

this date, the complainant made a statement that he did not wish to proceed against petitioner-Dr.Sudershan and accordingly, gave her up. The case was then sent to Station House Officer, Police Station, Civil Lines, Karnal, under Section 156(3) Cr.P.C. with a direction to register a case and investigate the same. It is thereupon that FIR No.61 dated 19.3.2003 under Sections 315, 304, 336, 34 IPC was registered. After thorough investigation of the case, police submitted a cancellation report on 2.5.2002 on the ground that Dr.Neeram Garg was found to have checked and attended to the child properly and no allegation of negligence, inviting criminal offence, was made out against her. The Chief Judicial Magistrate, Karnal, however, issued notice to the complainant who filed a protest petition on 6.11.2004, making same very allegations as had been raised by him in the complaint. Thereafter, statement of complainant, Sudhakar Mittal, was recorded as CW1. Another Advocate, Sh.Subodh Gupta, appeared as CW2, and thereafter the Chief Judicial Magistrate, on 18.7.2005, issued process, summoning the present petitioners for an offence under Section 304-A read with Section 34 IPC. Aggrieved against this action of Chief Judicial Magistrate, the petitioners have filed the abovesaid two separate petitions, seeking quashing of the complaint as well as the summoning order.

Strongly relying upon Jacob Mathew's case (supra), Mr.R.S.Cheema, counsel for the petitioners has contended that no prima-facie case is made out under Section 304-A IPC. This Court, while issuing notice of motion, stayed further proceedings before the trial Court.

Reply has been filed on behalf of the State as well as the

complainant giving detailed background. It is disclosed by the State that after registration of a case on the basis of allegation made, the matter was thoroughly investigated and cancellation report was filed on 2.5.2002. It is clearly disclosed that no case is made out against petitioner, Dr.Neera Garg and in support of this, various reasons are mentioned which would indicate that the child was properly attended to at the hospital by Dr.Neera Garg. In reply filed in the connected petition filed by Dr.Sudershan, the State has brought out the fact that the complainant gave up Dr.Sudershan through his statement made on 1.3.2002. The petitioner in this case, accordingly has sought dismissal of the complaint qua her on this basis as well.

Complainant-respondent No.2, however, has filed separate replies in both the cases. A preliminary objection is raised for dismissing the petition on the ground that earlier a Criminal Revision No.2000 of 2005 was filed, for same relief, which was dismissed as withdrawn with liberty to file petition under Section 482 Cr.P.C. Stating the present petitions to be nothing but second revision petitions, it is pleaded that the same would not be maintainable. Otherwise, it is pleaded that cancellation report was wrongly submitted by the Investigating Officer as he never approached the complainant for recording his statement. It is further pleaded that the Investigating Officer did not adopt a scientific approach to investigate the case properly and submitted cancellation report being swayed by the statements of doctors, who were none else but colleagues of the petitioners. The averments relating to the facts and other issues raised in the petitions have been denied and version, as put forward in the complaint, reiterated to urge that the

allegations made against the petitioners for negligence would be made out.

Learned Senior counsel, appearing for the petitioners, has mainly raised two fold submissions, seeking quashing of the complaint and the summoning order. He would first contend that the complainant admittedly had invoked jurisdiction under Section 156(3) Cr.P.C. with the prayer for registration of an FIR against the petitioners, which was referred to by the Chief Judicial Magistrate to the police, leading to registration of the FIR. As per the counsel, the cancellation report was submitted by the police after thorough investigation, which could not have been ignored by the magistrate while summoning the petitioner. By referring to the impugned summoning order, the learned counsel would say that this material is completely ignored or not even referred to by the Chief Judicial Magistrate while summoning the petitioners, which would render the impugned order bad in law, rendering the same unsustainable. Mr.Cheema is very fair in pointing out that there are some judgments dealing with this aspect of the matter, in cases which were referred for investigation under Section 202 Cr.P.C. and there may not be any case in this regard where such a view is taken, when the matter is referred by the Magistrate under Section 156(3) Cr.P.C. This, as per the counsel, would not make any material difference as question to be considered would relate to reliance on police investigation as material while passing the summoning order. In this regard, Mr.Cheema would first refer to the case of Anil Kumar Sah and others Vs. Nagendra Singh, 1991 Crl.L.J. 421. In this case, it is observed by the Patna High Court that Magistrate, no doubt, is fully

competent to dis-agree with and not accept the report of the Investigating Officer but while doing so, he must indicate his reasons in this regard, which must be cogent and legitimate one. Finding that Magistrate had done so without considering the facts found by the Investigating Officer in his report, it was held that such an approach is improper and erroneous.Relevant observations of the Court are:-

> " In the present case, the police case originally filed was found to be false and final report submitted and then in the complaint case, arising out of the protest petition, the investigation under Section 202 of the Code of Criminal Procedure again showed that the allegations are untrue. These features are not present in the aforesaid two reported decisions and obviously they do not apply to the present case. The Magistrate, no doubt, is fully competent to disagree with, and not accept the report of the Investigating Officer under Section 202 of the Code of Criminal Procedure but he must indicate the reasons for doing so and, needless to say, the reasons must be cogent and legitimate. Here the Magistrate without considering the facts found by the Investigating Officer in the report under Section 202 of the Code of Criminal Procedure, which indicated that the case is not true, has simply brushed aside the report for wholly extraneous reasons. Such an approach must be held to be improper and erroneous."

The learned counsel would also refer to the case of Daleep Singh Vs. Smt.Magan, 1996 Cri.L.J. 190 in this regard. In

this case also, the High Court of Rajasthan has opined that the Court has to consider the record and then arrive at its own conclusion whether a process should be issued or not and that result of enquiry under Section 202 Cr.P.C., is one such material, which the Magistrate is to take into consideration where such a report had accompanied the statements of the complainant and witnesses and while ignoring the same, a cognizance was taken. It was held to be tantamounting to abuse of the process of the Court and the impugned order was termed unsustainable. The relevant observations are as under:-

> “12. In Jagdish Ram's case (supra), this Court has held that the record which has been submitted by the police is a material placed on the record and it is the duty of the Court to consider that record and then to arrive at its own conclusion whether in such a case, process should be issued against the accused or not and that if the Magistrate has not looked into such material and issued process then it amounts to abuse of the process of the Court and grave miscarriage of justice. It is true that a Magistrate is not debarred from taking cognizance on a complaint merely on the ground that he earlier declined to take cognizance on the police report as has been held in Gopal Vijay Verma's case 1983 SCC (Cri) 110 (supra) and followed by this Court in Janki Prasad's case 1991 Crl LR 705 (supra) but it is the bounden duty of the Magistrate to consider the allegations made in the complaint and the statements of the complainant under

Section 200, Cr.P.C. and witnesses under Section 202, Cr.P.C. as also the result of the inquiry or investigation, if any under Section 202, Cr.P.C. and if he is of the opinion that prima facie an offence is made out then he is competent to take cognizance against the accused and issue process and in case, if he is of the opinion that there is no sufficient ground for proceeding then he shall dismiss the complaint.

13. In the case on hand, the learned Magistrate has not at all considered the report of the S.H.O., P.S., Sardar Shahar dated 24-10-1987, which was accompanied with the statements of the complainant and her witnesses. As mentioned earlier, the report was sent for by the Magistrate by sending a copy of the criminal complaint. Thus, the said report constituted material under Section 202, Cr.P.C. Consideration of the material under Section 202, Cr.P.C. is not an empty formality. Such consideration cannot be done in a perfunctory or mechanical manner or by adopting a superficial approach. Therefore, non-consideration of the aforementioned material under Section 202, Cr.P.C. ignoring the same and taking cognizance is tantamount to abuse of the process of the Court and on this ground, the impugned order cannot be sustained."

In addition, reliance has also been placed on an order passed by this Court in Crl.Misc.No.50886 M of 2004 (K.A.S.Parmar and others Vs. Manisha Chaudhary) decided on October 30,2006.

A perusal of the impugned summoning order would show that no reference has been made to the cancellation report submitted by the police when the case was referred to the police by the Chief Judicial Magistrate under Section 156(3) Cr.P.C. Section 156 (3) is an enabling provision in regard to the power of police officer to investigate cognizable cases. Any police officer, even without the order of a Magistrate can investigate any cognizable case and in this background Section 156(3) makes a provision that any Magistrate empowered under Section 190 may order such an investigation as above mentioned. Once the matter is referred by the Magistrate to the police for investigation under Section 156(3) and report is submitted pursuant thereto, the same certainly would be a material, which is to be considered. Magistrate apparently would lack power to take cognizance of an offence on the basis of a private complaint that has resulted in submission of a negative report under Section 173 consequent upon reference under Section 156(3) Cr.P.C., where he accepts such a report. Reference in this regard may be made to P.V.Krishna Prasad Vs. K.V.N.Koteswara Rao and another, 1991 CRL.L.J. 341. Section 202 Cr.P.C. has made it obligatory on the Magistrate that before summoning the accused, he shall enquire into the case himself or direct investigation to be made by the police officer. Mr.Cheema is justified in submitting that difference between Sections 202 and 156 Cr.P.C. would be in regard to investigation of non-cognizable and cognizable cases and otherwise these provisions would operate identically. He, as such, would not be unjustified in relying upon law laid down in Anil Kumar Sah's case and Daleep Singh's case (supra). Once the matter has been referred to police for

investigation by a Magistrate, then any report submitted by the police would be a material, which is required to be taken into consideration. It may still be ignored but where this is not taken into consideration, it would indicate non-application of mind or improper adjudication of the case, rendering the impugned order unsustainable being erroneous or improper. It was also pointed out that in a complaint filed by the complainant, he had made a specific prayer before the Magistrate for sending his complaint under Section 156(3) Cr.P.C. for registration and investigation of the case. His prayer in this regard was:-

> "It is, therefore, prayed that the S.H.O., P.S. Civil Lines, Karnal may kindly be directed to send the complaint u/s 156 (3) Cr.P.C. for registration and investigation of the case under Section 315, 304, 336 read with Section 34 IPC, in the interest of justice and observance of Rule of Law."

On this basis, it was submitted that result of investigation submitted pursuant to the abovesaid prayer of the complainant was bound to be taken into consideration and could not have been ignored.

I see substance in the submission made by counsel for the petitioners. The point of view raised by the counsel tends to seek support from the judgments in Anil Kumar Sah's case, Daleep Singh's case and K.A.S.Parmar's case (supra). The action of the Magistrate in not taking into consideration the relevant material submitted before him in the form of police investigation as a cancellation report was bound to receive consideration under law and none consideration thereof has led to an abuse of the process of the

Court and would call for interference in the impugned order.

Learned counsel for the petitioners, would also be justified in submitting that even otherwise the facts in these cases would not be sufficient to attract the provisions of Section 304-A for making the petitioners liable for criminal negligence while performing their duties as doctors. He has referred to in detail to the judgment in Jacob Mathew's case (supra), which would now regulate the legal aspect relating to the negligence on the part of a doctor to attract the provisions of Section 304A IPC. Jacob Mathew's case (supra) was referred to a larger Bench, doubting the view expressed in Dr.Suresh Gupta Vs. Govt. of N.C.T. of Delhi and another, 2004 (3) RCR (Criminal) 925. In Dr.Suresh Gupta's case (supra), the Hon'ble Supreme Court has held that “for this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable.” While referring the case of Jacob Mathew (supra) to a larger Bench, the referring Bench observed that “negligence or recklessness being gross is not a requirement of Section 304A and in case Dr.Suresh Gupta's case (supra) is allowed to rule the field, then word “*gross”* shall have to be read in Section 304A IPC for fixing criminal liability, an approach, which cannot be countenanced. The Reference Bench also observed that different standards for judging the criminal negligence or recklessness could not be applied to doctors and others and if it is so done, it will amount to doing violence to the plain and unambiguous language of Section 304A. It is in this context that the Hon'ble Supreme Court in Jacob Mathew's case (supra) took up the issues and has now finally settled

the same, approving the view taken in Dr.Suresh Gupta's case (supra). The Hon'ble Supreme Court has referred to the requirement of judging negligence as a tort and then noticed the distinction between the negligence as a tort and as a crime. It is observed that to fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. Reference in this regard was made to the case of *R. Vs. Lawrence,* 1982 AC 510, where Lord Diplock spoke, reiterating his opinion in *R. Vs. Caldwell,* 1982 AC 341, and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship's observations are:-

> “Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the Section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting `recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.”

The Hon'ble Supreme Court examined the aspect in detail and drew distinction between the civil and criminal liability in this

regard. It was observed that in order to hold the existence of criminal rashness or criminal negligence, it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The judgment of Riddell Vs. Reid, 1942 (2) All ER 161 was noticed to say that there is a clear distinction between "simple lack of care" incurring civil liability and "very high degree of negligence" which would be required in criminal cases. It was accordingly opined that the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. It was further held that to be punishable as a crime, the negligence has to be gross or of a very high degree. Having so determined, the Supreme Court also went into the question of negligence by professionals. In this regard reference was made to the opinion of McNair, J. in Bolam Vs. Friern Hospital Management Committee, (1957) 1 WLR 582, which is as under:-

> "[W]here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill... It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

It was further noticed that Bolam test has continued to be well received by every shore it has touched as neat, clean and a well-condensed one, which has been widely accepted as decisive of the standard of care required by professional before the courts in India as well. This can be so made out from the following observations:-

> "24. The classical statement of law in Bolam case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used."

The Hon'ble Supreme Court also observed that mere deviation from normal professional practice would not be necessarily an evidence of negligence. In this regard, reference may be made to the following:-

> “25.A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely

because he chose to follow one procedure and not another and the result was a failure."

Talking about the rule of *Res ipsa loquitur*, the Hon'ble Supreme Court observed that this is not of a usual application even in civil jurisdiction and has to be applied with extreme care and caution to the cases of professional negligence and in particular to that of the doctors. In this regard, the Hon'ble Supreme Court observed that this is a rule of evidence, which, in reality, belongs to law of torts in following words:-

"Res ipsa loquitur is a rule of evidence which in reality belongs to the Law of Tort. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule (see Syad Akbar v. State of Karnataka). Incidentally, it may be noted that in Krishnan v. State of Kerala the Court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned Judges constituting the Bench has in his concurring opinion merely stated "res ipsa loquitur". Nowhere has it been stated that the rule has applicability in a criminal case and an inference as to

an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304-A IPC cannot be decided solely by applying the rule of res ipsa loquitur."

The Hon'ble Supreme Court then went on to make a very telling observation in regard to the predicament that a medical practitioner would generally face while attending to emergencies by saying:-

"28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason- whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a

terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so) rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

The Hon'ble Supreme Court also carried out review of various Indian decision regarding criminal negligence and so also of medical professionals in a criminal law and finally summed up the conclusions as follows:-

" 48. We sum up our conclusion as under:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", breach and resulting damage."

2. Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part

of a professional, in particular a doctor additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

3. A professional may be held liable for

negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

4. The test for determining medical negligence as laid down in Bolam case. WLR at p.586 holds good in its applicability in India.

5. The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. Gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot from the basis for prosecution.

6. The word ”gross” has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be “gross”. The expression “rash or negligent act” as to be “gross”. The expression “rash or negligent act” as occurring in Section 304-A IPC has to be read as qualified by the word “grossly”.

7. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

8. Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determing the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.”

It was specifically noticed that there is an increase of doctors (surgeons and physicians) being subjected to criminal prosecution and that sometimes such prosecutions are filed by private complainants, who cannot always be supposed to have knowledge of medical science and it leads to a serious embarrassment and harassment. Such a professional when

proceeded against, has to seek a bail to escape arrest. In the end, he may be exonerated but the loss he has suffered to his reputation is not open to be compensated by any standards. The Supreme Court accordingly advocated for framing statutory rules or executive instructions, incorporating certain guidelines by the Government of India or the State Government in consultation with the Medical Council of India. These observations would need notice and are:-

> "51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.
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> 52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint

> may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

In view of the law as afore-mentioned, it can be seen that the case of the petitioners would not be covered by the standard of negligence required to be established for proceeding against a professional doctor with a charge of negligence under Section 304A IPC. It is mainly alleged against the petitioners that they had omitted to put the child of the complainant on ventilator, which had led to her death. The observation of the Hon'ble Supreme Court that

negligence in the context of medical profession necessarily calls for treatment with a difference and to infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations would apply may need notice. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. It was specifically observed by the Supreme Court that so long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

It is submitted that putting the child on ventilator, as alleged in the complaint, cannot be said to be an ideal treatment in such cases. The complainant in this regard has mainly referred to the opinion of Dr.Sarita Chatley of Uttam Nursing Home to say that in such grave respiratory problem, the child was immediately required to be put on ventilator, which alone could have saved her life. This is not borne out from the record and rather stands rebutted from an affidavit filed by Dr.Sarita Chatley (Annexure P-14), which is to the effect that she never gave the above referred opinion to the complainant. She has further deposed that ventilator is not normally needed for every meconium stained and aspired newly born baby. Thus, the entire basis made by the complainant to allege criminal negligence is not made out. In this context, it would also be relevant to notice the conclusions of the Hon'ble Supreme Court in Jacob Mathew's case (supra) to the effect that to prosecute a medical

practitioner for negligence under criminal law, it must be shown that the accused did something or failed to do something, which, in the given facts and circumstances, no medical professional in his ordinary senses and prudence would have done or failed to do. The Hon'ble Supreme Court also noticed that a private complaint may not be entertained unless the complainant has produced prima-facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of accused doctor. It is further held by the Supreme Court, as noticed above, the Investigating Officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. In the present case, no evidence in this regard has either been produced or recorded before the Chief Judicial Magistrate. Even the Investigating Officer also did not do so. He had, in any case, found that there was no negligence on the part of the petitioners.

In view of the discussions as noticed above, the present case would not reveal any criminal negligence on the part of the petitioners and also would not reveal sufficient basis for proceeding against them with a charge of criminal negligence. While summoning the petitioners, the Chief Judicial Magistrate has clearly failed to notice the law laid down by the Hon'ble Supreme Court. He can rightly be expected to take on record some medical evidence as held

by Hon'ble Supreme Court in Jacob Mathew's case (supra) before summoning the petitioners. The present proceedings as such cannot be allowed to continue being an abuse of the process of Court. It is also not understood as to how the proceedings against petitioner-Dr.Sudershan are being continued despite having been given up by the complainant himself.

Accordingly, both the petitions are allowed and the complaint dated 6.2.2002 and the summoning order dated 18.7.2005 are ordered to be quashed.

January , 2007 **(RANJIT SINGH)**
khurmi **JUDGE**